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An Opinion Without Standards: The Supreme Court's Refusal to Adopt a Standard of Constitutional Review in *District of Columbia v. Heller* Will Likely Cause Headaches for Future Judicial Review of Gun-Control Regulations

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I. INTRODUCTION

"Guns don't kill people—people kill people."[1] This is the bumper-sticker language of many gun-rights advocates arguing that the American people should not have their guns snatched away simply because other people are killed or injured by firearms. After all, guns do not discharge themselves. The opposing argument, often put forth by those urging the government to enact stronger gun-control regulations, is seen by many to be equally valid: though guns do not discharge themselves, guns play a part—whether accidentally or purposely—in thousands of American deaths and injuries each year.[2] These two competing interests form the foundation of today's gun-control debate.

Over the past few decades, with gun control becoming a major political and social issue, the debate has also focused on whether the Second Amendment to the Constitution grants each American citizen an individual right to "keep and bear Arms" or whether the Second Amendment establishes only a collective right to keep and bear arms in order to preserve a "well regulated Militia."[3] Federal courts throughout the country have traditionally held that the Second Amendment should be interpreted as giving United States citizens only a collective right to keep and bear arms.[4] This collective-right interpretation has arguably made gun-control regulations easier to pass because under the collective-right reading, the government can restrict an individual's right to keep and bear arms as long as these regulations do not restrict the right to keep

1. FRANKLIN E. ZIMRING & GORDON HAWKINS, THE CITIZEN'S GUIDE TO GUN CONTROL 13 (1992).

2. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2856–57 (2008) (Breyer, J., dissenting).

3. U.S. CONST. amend. II.

4. Lewis v. United States, 445 U.S. 55 (1980); United States v. Miller, 307 U.S. 174 (1939). *Miller* was considered the seminal Second Amendment case and had traditionally been interpreted by courts to adopt the collective-right reading before the Supreme Court's opinion in *District of Columbia v. Heller*. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 685 n.6 (2007).

and bear arms as related to service in a militia. The pendulum of Second Amendment interpretation, however, swung sharply in the opposite direction, in favor of an individual-right theory of the Second Amendment, during the 2008 Supreme Court term.

The Supreme Court in *District of Columbia v. Heller*,[5] for the first time in its history, expressly and explicitly adopted the individual-right theory of the Second Amendment.[6] Both Justice Scalia's majority opinion and Justice Stevens's dissenting opinion present persuasive and authoritative textual and historical arguments to support the individual- and collective-right theories respectively. Although the majority convincingly argued for an individual-right reading of the Second Amendment, the majority omitted from its lengthy opinion the specific standard of review courts should now use to determine the constitutionality of current and future gun-control regulations in light of the newly endorsed individual-right interpretation.[7] Not only did the Court refuse to adopt a specific standard, it may have rejected, either explicitly or implicitly, all possible standards of constitutional review for gun-control regulations.[8] Therefore, given the Court's failure to adopt a specific standard of constitutional review for this newly adopted individual-right interpretation, federal courts will likely experience difficulties in applying the *Heller* opinion to existing and future gun-control regulations.

Part II of this Note will examine the traditional collective-right reading of the Second Amendment through a recent Ninth Circuit case, *Silveira v. Lockyer*.[9] The *Silveira* opinion endorsed the collective-right reading and criticizes the Fifth Circuit's adoption of the individual-right

5. 128 S. Ct. at 2783.

6. *Id.* at 2797. Although considered monumental in that it officially adopted for the first time an individual-right theory of the Second Amendment, this ruling by the Supreme Court was not unexpected. *See* Saul Cornell, *Historical Approach: The Ironic Second Amendment*, 1 ALB. GOV'T L. REV. 292, 294 (2008) ("[T]he ultimate irony may well be that the Supreme Court [in *District of Columbia v. Heller*] could easily interpret the Second Amendment as an individual right and still uphold the District of Columbia's hand gun ban as a reasonable regulation."); Winkler, *supra* note 4, at 684–86 (discussing that the Fifth Circuit adopted the individual-right theory in *United States v. Emerson* and that the individual-right theory became the official position of the Bush Administration's Department of Justice in 2002).

7. The standard by which gun-control regulations should be reviewed by courts under the individual-right theory of the Second Amendment is considered by some scholars to be nearly as important as the collective right vs. individual right argument itself. *See* Winkler, *supra* note 4, at 683–86. As will be discussed in detail below, Justice Breyer in his dissent in *District of Columbia v. Heller* criticized the majority for not adopting a specific standard of review and expressed the importance of an adoption of a standard of review under an individual-right interpretation. 128 S. Ct. at 2851 (Breyer, J., dissenting) ("What kind of constitutional standard should the court use? How high a protective hurdle does the Amendment erect? The question matters.").

8. *See infra* discussion and notes accompanying Part IV.D.

9. 312 F.3d 1052 (9th Cir. 2002).

reading in *United States v. Emerson*[10] (this opinion by the Fifth Circuit being the first time a federal court of appeals adopted the individual-right reading of the Second Amendment). Part III will summarize Justice Scalia and the majority's most notable arguments for an individual-right reading in the *Heller* opinion, along with a brief treatment of both the dissenting opinions filed by Justice Stevens and Justice Breyer. Finally, Part IV of this Note will outline four alternative standards of review that courts might use (and that the Supreme Court could have adopted) in analyzing gun-control regulation under an individual-right reading of the Second Amendment: (1) rational-basis scrutiny, (2) strict scrutiny, (3) an "interest-balancing" standard as suggested by Justice Breyer's dissent in *Heller*, and (4) intermediate scrutiny (arguably being the only standard not explicitly or implicitly rejected by the majority in *Heller*). This Note will endorse and argue for Justice Breyer's interest-balancing approach as the standard that should have been adopted by the majority in *Heller*. Part IV will also attempt to determine how courts are to review existing and future gun-control regulations given that the Court in *Heller* refused to adopt a standard and rejected most, if not all of the standards of constitutional review commonly used.

II. CONTEXT AND BACKGROUND

In officially endorsing an individual-right view of the Second Amendment, the Supreme Court in *Heller* seemed to settle a long and drawn-out legal debate that has lasted for decades. However, as one door of debate and controversy closed, another opened. By failing to adopt a standard by which gun-control regulations will be reviewed for constitutionality under the newly endorsed individual-right reading, the Court opened the door for another debate concerning this historically and textually ambiguous Second Amendment.

First, it is important to establish the context surrounding the issue decided by the *Heller* opinion. On one side (the losing position in *Heller*) is the theory that the Second Amendment protects a "collective right" to keep and bear arms.[11] On the other side is the theory adopted by Justice Scalia in *Heller*: the "individual-right" theory.[12] Each side has strong and convincing historical evidence to support its respective interpretation of the Second Amendment. As recently as 2001 and 2002, two federal appellate courts kept this dichotomy alive. In 2002, the Ninth Circuit in

10. 270 F.3d 203 (5th Cir. 2001).
11. *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting).
12. *Id.* at 2799 (Scalia, J., majority).

Silveira v. Lockyer[13] held in favor of a collective-right reading of the Second Amendment, while in 2001, the Fifth Circuit became the first federal appellate court to explicitly adopt an individual-right reading of the Second Amendment in *United States v. Emerson*.[14] Outlined below is an in-depth look at the *Silveira* case. The *Silveira* court directly addressed several arguments set out in *Emerson*;[15] therefore, along with its endorsement of the collective-right reading, the treatment of the *Silveira* case below will also introduce several of the arguments made for an individual-right reading by the Fifth Circuit in *Emerson*. The direct treatment of *Silveira* and the indirect treatment of *Emerson* below will give important context to the majority's decision in *Heller*.

A. The Collective-Right Theory: Silveira v. Lockyer

The Ninth Circuit case *Silveira v. Lockyer* illustrates the long-held collective-right reading of the Second Amendment—the reading rejected by the Supreme Court in *District of Columbia v. Heller*.[16] In 1999, California amended its gun-control laws to bolster the state's restriction on the "possession, use and transfer" of semi-automatic weapons or "assault weapons."[17] The plaintiffs in *Silveira* consisted of California residents who owned or sought to acquire assault weapons but were prevented from doing so because of the newly amended gun-control statute.[18] The gun owners challenged the statute, claiming that as amended, the statute violated their Second Amendment right to keep and bear arms.[19] The Ninth Circuit disagreed, endorsing a collective-right reading of the Second Amendment and holding that the statute did not violate this collective-right reading.[20]

1. The Ninth Circuit first outlined the modern Second Amendment debate

The Ninth Circuit began its analysis in *Silveira* by outlining the "robust constitutional debate" that was taking place throughout the country concerning the proper interpretation of the Second

13. 312 F.3d at 1056.
14. 270 F.3d at 210.
15. *Silveira*, 312 F.3d at 1064–65.
16. *Id.* at 1061.
17. *Id.* at 1056.
18. *Id.*
19. *Id.*
20. *Id.* at 1087.

Amendment.[21] The court outlined three principal schools of thought at the heart of the debate.[22] First, the court referred to the view urged by the National Rifle Association ("NRA") and other pro-gun advocates as the "'traditional individual right'" model.[23] Those that espouse this view argue that individuals have a "fundamental right" to possess and use guns with only the most limited governmental regulation.[24] The second view, labeled the "'limited individual right'" model, allows individuals to possess and use firearms as long as the possession bears a reasonable relationship to military service.[25]

The third view, described by the Ninth Circuit as the view "widely accepted by the federal courts," is the collective-right interpretation of the Second Amendment.[26] The Ninth Circuit cited two Supreme Court cases that have long been used to support a collective-right reading of the Second Amendment.[27] In the first of these cases cited by the *Silveira* court, *Lewis v. United States*,[28] the Supreme Court cited to its best-known Second Amendment case to support a collective-right reading of the Second Amendment—*United States v. Miller*.[29] The *Lewis* Court held: "The Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[30] The Ninth Circuit did not end its argument in support of a collective-right theory with these strong precedential Supreme Court cases. Instead, the court went on to conduct its own independent historical analysis to reinforce the collective-right reading of the Second Amendment.[31]

21. *Id.* at 1060. The court attributed this national interest in the Second Amendment to "gun violence, the passage of legislation restricting the sale and use of firearms, the cultural significance of firearms in American society, and the political activities of pro-gun enthusiasts under the leadership of the National Rifle Association (the NRA)." *Id.*

22. *Id.*

23. Only one court had advocated this view of the Second Amendment before the Supreme Court's decision in *Heller*; the Fifth Circuit adopted this view in *United States v. Emerson*, 270 F.3d 203, 219 (5th Cir. 2001).

24. *Emerson*, 270 F.3d at 219.

25. *Silveira*, 312 F.3d at 1060. This view is nuanced and has also been labeled the "sophisticated collective-right model" by the *Emerson* court. 270 F.3d at 219. For a discussion of this nuanced middle ground of the Second Amendment debate, see *Silveira*, 312 F.3d at n.8.

26. *Silveira*, 312 F.3d at 1060.

27. *Id.* at 1061.

28. 445 U.S. 55 (1980).

29. 307 U.S. 174 (1939).

30. *Lewis*, 445 U.S. 55, 65 n.8 (quoting *Miller*, 307 U.S. at 178).

31. *Silveira*, 312 F.3d at 1068–76.

2. The Ninth Circuit's historical arguments in support of the collective-right interpretation.

The Ninth Circuit in *Silveira* argued for the collective-right reading of the Second Amendment by examining the historical significance of both the first (prefatory) and second (operative) clauses of the amendment.[32] The prefatory clause reads, "A well regulated Militia, being necessary to the security of a free State," and the operative clause of the Second Amendment reads, "the right of the people to keep and bear Arms, shall not be infringed."[33] The *Silveira* court argued that the "prefatory clause of the Second Amendment sets forth the amendment's purpose and intent."[34]

a. The prefatory clause: the Silveira *court's interpretation of "militia."* The most notable argument by the Ninth Circuit concerning the prefatory clause deals with the meaning of the term "militia" as seen in Second Amendment. The court argued that the word "militia" refers to a state military entity. In making this argument, the Ninth Circuit was countering the Fifth Circuit's argument in *Emerson* that the term "militia," as used at the time the Second Amendment was ratified, referred to all citizens.[35] The *Silveira* court argued that the use of the term "militia" as used in Articles I and II of the Constitution, as well as the Fifth Amendment, contradicts the Fifth Circuit's very broad interpretation of the term militia.[36] The Ninth Circuit pointed out that Article I grants to Congress the power to "provide for calling forth the Militia to execute Laws of the Union, suppress Insurrections and repel Invasions."[37] The court stated that "[t]he fact that the militias may be 'called forth' by the federal government only in appropriate circumstances underscores their status as state institutions."[38] Also, the Commander-in-Chief Clause of Article II provides for the President to act as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States."[39] The Fifth Amendment, which was enacted at the same time as the Second Amendment, grants

32. This approach of analyzing the historical significance of both the prefatory and operative clauses and their relationship to one another is the same approach taken by the Fifth Circuit in *Emerson* and the Supreme Court in *Heller*—but with obviously different results. *See infra* Part III.

33. U.S. CONST. amend. II.

34. *Silveira*, 312 F.3d at 1068–69.

35. *See Silveira*, 312 F.3d at 1069 (quoting United States v. Emerson, 270 F.3d 203, 235 (5th Cir. 2001)).

36. *Id.* at 1070–71.

37. *Id.* at 1070 (quoting U.S. CONST. art. I, § 8, cl. 15).

38. *Id.*

39. U.S. CONST. art. II, § 2, cl. 1.

criminal defendants a right to indictment "except in cases arising in the land or naval forces, or in the Militia . . . ."[40]

According to the *Silveira* court, these excerpts from Article II and the Fifth Amendment clearly demonstrate that the Framers saw the "Militia" as a military body, not as the entire arms-bearing American population as the Fifth Circuit argued.[41] Therefore, in *Silveira*, the Ninth Circuit argued that the prefatory clause of the Second Amendment establishes the purpose of the amendment: to provide for and preserve a well-regulated (state-run) militia.[42]

b. The operative clause: the meaning of "keep and bear Arms." The Ninth Circuit went on to analyze the operative or second clause of the Second Amendment.[43] The court first found it "highly significant" that "the second clause does not purport to protect the right to 'possess' or 'own' arms, but rather to 'keep and bear' arms."[44] The court argued that "[h]istorical research shows that the term 'bear arms' generally referred to the carrying of arms in military service—not the private use of arms for personal purposes."[45] The court quoted Professor Michael Dorf who, after "canvassing" founding-era documents, concluded that the phrase to "keep and bear Arms" had an overwhelmingly military connotation.[46] The Ninth Circuit also cited an 1840 Tennessee Supreme Court case that clearly construed the term "to bear arms" to have a strictly military connotation.[47] The *Silveira* court made several other historical arguments relating to the term "bear arms" and then moved on to address the use of the term "keep" in the prefatory clause.[48]

The Ninth Circuit focused on the term "keep" because the *Emerson* court put forth the argument that the term "keep" did not have a military

40. *See Silveira*, 312 F.3d at 1070–71 (quoting U.S. CONST. amend. V).

41. *Id.* at 1071.

42. *Id.* at 1071–72.

43. *Id.* at 1072.

44. *Id.*

45. *Id.* In footnote 28 of its opinion, the *Silveira* court pointed out that the *Emerson* court, in its argument for an individual-right reading, had focused on a few phrases where "bear arms" did not denote service in the military. The *Emerson* court focused its argument on the Report of the Minority of the Pennsylvania Ratifying Convention of the United States Constitution. 270 F.3d 203, 230–31 (5th Cir. 2001). This Minority Report argued for a private right to bear arms, but the *Silveira* court correctly stated that this was indeed the "minority" opinion of the Pennsylvania Convention, meaning that this private-right-to-bear-arms argument was rejected by the Pennsylvania Convention. *Silveira*, 312 F.3d at n.28.

46. *Id.* at 1072–73 (quoting Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 314 (2000)).

47. *Id.* (quoting Aymette v. State, 21 Tenn. 154 (1840)) ("'A man in pursuit of deer, elk and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms.'").

48. *Id.* at 1072–74.

connotation.[49] The *Silveira* court did not find this argument very convincing given that individuals may "keep" arms for many purposes, including military use.[50] The court argued that the term "keep" has no meaning without knowing the purpose for which the individual is "keeping" the arms.[51] For this reason, many scholars have construed the term "keep and bear" together because the term "bear" (which, according to the *Silveira* court, had a military connotation at the time of ratification) gives purpose to the term "keep."[52]

c. The Silveira court's holding. The court concluded from its examination of both the prefatory and the operative clauses of the Second Amendment that "the most plausible construction of the Second Amendment is that it seeks to ensure the existence of effective state militias in which the people may exercise their right to bear arms."[53] The court therefore endorsed the collective-right reading of the Second Amendment and rejected the *Emerson* court's individual-right interpretation. After adopting a collective-right reading, the court accordingly refused to strike down California's ban on assault weapons, much to the dismay of gun-rights advocates such as the NRA. However, only six years later, the NRA and gun advocates throughout the country would receive their much-desired outcome in the Supreme Court of the United States.

III. THE SUPREME COURT'S OPINION: *DISTRICT OF COLUMBIA V. HELLER*

In the recent landmark decision of *District of Columbia v. Heller*,[54] the Supreme Court, for the first time in its history, interpreted the Second Amendment as granting an individual right to each American citizen to keep and bear arms.[55] The District of Columbia's gun-control regulations at issue in *Heller* essentially banned the possession of all handguns in the District and required those who kept other firearms at home to either disassemble their guns or render them unusable by employing a trigger-

49. *See id.* at 1074.

50. *Id.*

51. *Id.*

52. *Id.* Construing the term "keep and bear" together is tersely rejected by Justice Scalia in his majority opinion in *Heller*. *See infra* Part.III.A.1.b. Both sides offer very convincing arguments as to the meaning of and correct reading of the term "keep and bear Arms." These dueling historical arguments, although interesting, are never-ending. The fact that the individual-right theory wins the day in *Heller* appears to be the result of a majority of Justices espousing one of the two arguments—not because of the historical strength of the individual-right reading and the historical weakness of the collective-right reading.

53. *Silveira*, 312 F.3d at 1075.

54. 128 S. Ct. 2783 (2008).

55. *Heller,* 128 S. Ct. at 2797.

locking mechanism.[56] Mr. Dick Heller challenged the constitutionality of the D.C. handgun regulations.[57] Mr. Heller was allowed to carry a handgun while he worked as a special police officer at the Federal Judicial Center, but under the anti-handgun regulation, Mr. Heller was not allowed to register a handgun that he wished to keep at his home.[58] Mr. Heller argued that this ban on handguns and the regulation's requirement to render all other firearms kept in the home unusable were violations of his right to have access to a weapon for self-defense in the home.[59] The U.S. District Court dismissed Mr. Heller's challenge of the D.C. gun-control regulations,[60] but the Court of Appeals for the District of Columbia Circuit reversed, finding the regulations unconstitutional.[61]

With this decision, the D.C. Circuit became the second federal appellate court (the Fifth Circuit in *Emerson* being the first) to hold that the Second Amendment protects an individual right to keep and bear arms.[62] The court held that "the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense" violated Mr. Heller's individual right to keep and bear arms.[63] As discussed above, the Supreme Court fully affirmed the D.C. Circuit's holding the following year.[64] The Ninth Circuit in *Silveira* outlined the strongest arguments in support of a collective-right reading of the Second Amendment.[65] Outlined below are the strongest arguments in support of an individual-right reading of the Second Amendment as espoused by Justice Scalia and the majority in *Heller*.

A. The Supreme Court Discusses the "Meaning"of the Second Amendment

In his majority opinion in *Heller*, Justice Scalia devoted twenty-seven pages of his thirty-five-page opinion to argue that the Second Amendment's proper meaning grants each individual citizen a right to

56. *See* D.C. CODE §§ 7-2501.01(12); 7-2502.01(a); 7-2502.02(a)(4); 7.2507.02 (2001) (providing that individuals could possess handguns with a one-year license from the District; however, the District gave licenses only in a very narrow set of circumstances).

57. *Heller*, 128 S. Ct. at 2788.

58. *Id.*

59. *Id.*

60. Parker v. District of Columbia, 311 F. Supp. 2d 103, 109 (D.D.C. 2004).

61. Parker v. District of Columbia, 478 F.3d 370, 401 (D.C. Cir. 2007).

62. *Id.*

63. *Heller*, 128 S. Ct. at 2788.

64. *Id.* at 2822.

65. *See supra* Part II.A.2.

keep and bear arms for the purpose of self-defense.[66] This "Meaning of the Second Amendment" section focuses primarily on the historical and textual arguments in favor of an individual-right reading of the Second Amendment. Justice Scalia also, to a lesser degree, discussed whether an individual-right reading conflicts with any Supreme Court precedent cases[67] and whether the right to keep and bear arms exists through natural law, separate from any enumeration of this right.[68]

1. Justice Scalia's historical and textual support for an individual-right reading

Like the Fifth Circuit in *Emerson*,[69] Justice Scalia analyzed the historical and textual meanings of the prefatory and operative clauses of the Second Amendment to argue for an individual-right reading.[70] Justice Scalia first disputed the argument made in *Silveira* and by Justice Stevens in his dissent that the prefatory clause limits the operative clause.[71] Justice Scalia refuted this argument by quoting a nineteenth-century commentary on written laws, which states: "'It is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.'"[72] This is an important piece of the majority's argument for an individual-right reading of the Second Amendment because the collective-right advocates argue that the prefatory clause gives meaning or purpose to the operative clause and thereby limits its meaning.[73] Instead of beginning with an analysis of the prefatory clause, however, Justice Scalia began by analyzing the operative clause.[74]

66. *Id.* at 2789–2816.

67. *Id.* at 2812–15.

68. *Id.* at 2801.

69. *See supra* Part II.A.2.

70. *See Heller*, 128 S. Ct. at 2789. Justice Scalia also refers to the prefatory clause as the "preamblee" and the operative clause as the "enacting part."

71. *Id.* at 2789.

72. *Heller*, 128 S. Ct. at 2789 (quoting J. BISHOP, COMMENTARIES ON WRITTEN LAWS AND THEIR INTERPRETATION §51, at 49 (1882)).

73. *See* Silveira v. Lockyer, 312 F.3d 1052, 1068–69 (9th Cir. 2002).

74. Justice Scalia began with the operative clause because he claims that the prefatory clause can only be used to "clarify an ambiguous operative provision" and that, therefore, "surely the first step must be to determine whether the operative clause provision is ambiguous." *Heller*, 128 S. Ct. at 2790 n.4. This approach of analyzing the operative clause before the prefatory clause is criticized by Justice Stevens in his dissenting opinion. *See id.* at 2826 (Stevens, J., dissenting).

a. The majority's analysis of the term "Right of the People" in the operative clause. Justice Scalia and the majority began their analysis of the operative clause of the Second Amendment by examining the term "Right of the People."[75] The Court points out that this term is used two other times in the Bill of Rights: in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause.[76] According to the Court, the term "Right of the People" in the First and Fourth Amendments "unambiguously refer[s] to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body."[77] Given that the use of "Right of the People" elsewhere in the Bill of Rights denotes individual rights, the Court sees this as an implication that the use of "Right of the People" in the Second Amendment should also have an individual-right connotation.[78] Justice Scalia also examined when the term "the people" is used elsewhere in the Constitution.[79] According to the majority, the six other times "the people" appears in the Constitution, the term "unambiguously refers to all member of the political community, not an unspecified subset."[80]

b. The majority's analysis of "keep and bear Arms" in the operative clause. Justice Scalia and the majority next addressed the phrase "keep and bear Arms" as seen in the operative clause of the Second Amendment.[81] The Court argued that the term "arms" applied to weapons that were not specifically designed for military use.[82] The Court cited Cunningham's legal dictionary as saying: "'Servants and labourers shall use bows and arrows on Sundays & c. and not bear other arms.'"[83] Justice Scalia explained that the term "'bear'" in the eighteenth century meant "'carry.'"[84] Justice Scalia wisely cited to Justice Ginsburg's

75. *Id.* at 2790.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 2790–91.

80. *Id.* (citing TIMOTHY CUNNINGHAM, 1 A NEW AND COMPLETE LAW DICTIONARY (1771)). Justice Scalia cited here to *United States v. Verdugo-Urquidez*, which states, "'The people' seems to have been a term of art employed in select parts of the Constitution . . . [that] refers to a class of persons who are part of a national community." 494 U.S. 259, 265 (1990).

81. *Heller*, 128 S. Ct. at 2791.

82. *Id.*

83. *Id.* This use of the word "arms" clearly does not limit its use to military situations, since it is used in the context of service or labor. *But see* J. TRUSLER, THE DISTINCTION BETWEEN WORDS ESTEEMED SYNONYMOUS IN THE ENGLISH LANGUAGE 37 (1794) ("[T]his eighteenth-century thesaurus limited "arms" to have the meaning of "instruments of offence generally made use of in war.").

84. *Heller*, 128 S. Ct. at 2793 (citing T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1796)).

opinion in *Muscarello v. United States*,[85] in which she reasoned that the term "carry a firearm" had the meaning "as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear , or carry . . . for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'"[86] Justice Scalia agreed with Justice Ginsburg's definition of "bear arms" and pointed out that Justice Ginsburg's definition "in no way connotes participation in a structured military organization."[87] The majority concluded that this definition of "bear arms" enunciated by Justice Ginsburg was the "natural meaning" of "bear arms" in the eighteenth century.[88]

The Court went on to buttress its position by arguing that the most notable evidence of the eighteenth-century meaning of "bear arms" is found in nine state constitutions drafted in the eighteenth and early nineteenth centuries.[89] These state constitutions grant each citizen the right to "'bear arms in defense of himself and the state.'"[90] The Court argued that this formulation of "bear arms" in the state constitutions did not exclusively refer to bearing arms in a military capacity; on the contrary, this formulation explicitly reserved to each citizen an individual right to bear arms for the purpose of his self-defense.[91]

The majority also addressed a study discussed by Justice Stevens in his dissent, which concluded that the term "bear arms" was most frequently used in a military context at the time of the ratification.[92] Justice Scalia rejected this argument by reasoning that the fact that the term "bear arms" was frequently used in one context does not necessarily limit its use to that frequently used context.[93] Justice Scalia also addressed Justice Stevens's argument (also made by the Ninth Circuit in *Silveira*[94]) that "'keep and bear Arms'" is a unitary phrase—or, in other words, that the term "bear" gives meaning to the term "keep."[95] Justice

85. *Id.* (citing Muscarello v. United States, 524 U.S. 125 (1998)).

86. *Id.* (quoting *Muscarello*, 524 U.S. at 143 (Ginsburg, J., dissenting)).

87. *Heller*, 128 S. Ct. at 2793. This is well argued by Justice Scalia, given that he uses Justice Ginsburg's definition of "bear arms"—Justice Ginsburg being one of the four dissenting Justices in the *Heller* case. *Id.* at 2787.

88. *Id.* at 2793.

89. *Id.*

90. *Id.* (citing PA. DECLARATION OF RIGHTS § XIII; VT. DECLARATION OF RIGHTS § XV; KY. CONST. art. XII, cl. 23 (1792); OHIO CONST. art. VIII, § 20 (1802); IND. CONST. art. I, § 20 (1816); MISS. CONST. art. I, § 23 (1817); CONN. CONST. art. I, § 17 (1818); ALA. CONST. art. I § 23 (1819); MO. CONST. art. XIII, § 3 (1820)).

91. *Heller*, 128 S. Ct. at 2793.

92. *Id.* at 2795; *see id.* at 2828–29 n.9 (Stevens, J., dissenting).

93. *Id.* at 2795.

94. *See supra* Part II.A.2.

95. *Heller*, 128 S. Ct. at 2797.

Scalia disagreed that "'keep and bear Arms'" is a unitary phrase, but he stated that even assuming the phrase was unitary, there is no evidence that this phrase has a military meaning.[96] Instead, Justice Scalia cited to historical instances where "keep and bear Arms" has a nonmilitary meaning.[97] The majority concluded its analysis of the operative clause by stating: "Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation."[98]

c. The majority's analysis of "well regulated Militia" in the prefatory clause. After its extensive analysis of the operative clause, the majority next briefly turned to the prefatory clause in order to criticize the petitioners' and the dissenting Justices' "narrow" view of the definition of the term "Militia" as found in the Second Amendment.[99] The petitioners (the District of Columbia) argued that "militias" during the time period of ratification were state or congressionally regulated military forces.[100] Justice Scalia, however, explained that "'the Militia comprised all males physically capable of acting in concert for the common defense.'"[101] Justice Scalia argued that militias were groups of citizens *able* to fight, not existing, organized bodies *ready* to fight.[102] This point is important to the majority because if militia denoted all able-bodied male citizens, all able male citizens would have the right to keep and bear arms—whether a militia was organized or not. Justice Scalia's definition of "militia" undercuts one of the main arguments used by those who endorse a collective-right reading of the Second Amendment.[103] The majority only briefly examined the term "'well

96. *Id.* This claim that there is no evidence that the unitary phrase "keep and bear Arms" has a military meaning is directly rebutted by the Ninth Circuit in *Silveira v. Lockyer*. *See supra* Part II.A.2. The Ninth Circuit argued that "bear" has a military meaning and that when "bear" is read with "keep," the unitary phrase has a military meaning. *Id.* This argument between individual-right advocates and collective-right advocates is a perfect example of the directly conflicting, yet equally reputable, historical evidence that each side uses to support its respective position in the debate. This argument also suggests that perhaps the individual-right reading won out not because it is the correct argument (it may be impossible to tell which one is correct), but because the majority simply chose to accept one group of valid historical arguments over another group of valid historical arguments.

97. *Heller*, 128 S. Ct. at 2797 ("In a 1780 debate in the House of Lords, for example, Lord Richmond described an order to disarm private citizens (not militia members) as a 'violation of the constitutional right of Protestant subjects to keep and bear arms for their own defense.'" 49 THE LONDON MAGAZINE OR GENTLEMEN'S MONTHLY INTELLIGENCER 467 (1780)).

98. *Heller*, 128 S. Ct. at 2797.

99. *Id.* at 2799.

100. *Id.* (citing Brief for Petitioners, at 12).

101. *Id.* (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

102. *Id.*

103. *See* Part II.A.2.a.

regulated'" in the prefatory clause as meaning "the imposition of proper discipline and training."[104]

One reason for the majority's relatively brief treatment of the prefatory clause is, according to Justice Scalia, the prefatory clause does not limit the operative clause.[105] Therefore, since the "right of the people to keep and bear Arms" language in the operative clause is most important to the majority, Justice Scalia focused on this right-granting language. Justice Scalia went on to ask: "Does the preface [prefatory clause] fit with an operative clause that creates an individual right to keep and bear arms?"[106] He answered his own question by saying: "It fits perfectly, once one knows the history that the founding generation knew and that we have described above."[107]

d. The majority's alternative, natural-right argument for the Second Amendment. An element of the majority's opinion worth exploring here is Justice Scalia's acknowledgment that it is "entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia."[108] However, as discussed above, according to Justice Scalia, the prefatory clause does not suggest that the right to bear arms should be limited to the militia—Justice Scalia claimed that Americans expected and today expect more from the Second Amendment.[109]

One might argue that even though protecting the militia is not the only expectation Americans have of the Second Amendment—the text of the Amendment itself does not suggest that it meant more. Justice Scalia appeared to address this problem by arguing that the right to bear arms was and is "ancient" or natural.[110] Justice Scalia argued that the Framers, through the Second Amendment, codified a right that already existed. The Second Amendment declared or formalized this ancient right, but the right existed before the ratification of this Amendment and, according to Justice Scalia, the individual right to keep and bear arms continued to exist after the ratification—regardless of what was meant by

104. *Heller*, 128 S. Ct. at 2800 (citing SAMUEL JOHNSON, 1 DICTIONARY OF THE ENGLISH LANGUAGE 1619 (4th ed. 1773)).

105. *Id.* at 2789.

106. *Id.* at 2801.

107. *Id.* With the phrase, "[i]t fits perfectly," Justice Scalia may be overplaying his hand. The majority makes a strong argument for an individual-right reading of the Second Amendment, but saying that "[i]t fits perfectly" is probably the strongest statement Justice Scalia could make, especially considering that these two clauses have been debated for decades. If it is so clear that the two clauses fit perfectly under an individual-right reading, why the years and years of debate?

108. *Id.*

109. *Id.*

110. *Id.*

the Second Amendment.[111] Justice Scalia did not rely on this "natural right to bear arms" idea as the crux of his argument, but if he did, this argument would be rather convincing. With this natural-right argument, Justice Scalia could essentially concede to the dissenters all of their historical and textual arguments surrounding the Second Amendment and still come out victorious—the natural right to keep and bear arms would exist independent of any text.

e. The interpretation of the Second Amendment immediately after its ratification. To solidify its argument that the Second Amendment granted an individual right to keep and bear arms, the majority examines post-ratification commentary on the meaning of the Second Amendment.[112] According to Justice Scalia, three "important founding-era legal scholars" interpreted the Second Amendment as protecting an individual right "unconnected with military service."[113] First, Justice Scalia cited to what is arguably the most well-known and notable legal commentary: Blackstone.[114] According to Justice Scalia, "St. George Tucker's version of Blackstone's Commentaries . . . conceived of the Blackstonian arms right as necessary for self-defense."[115] The majority also quotes Tucker as saying: "The right to self-defense is the first law of nature. . . ."[116]

Second, Justice Scalia discussed the Second Amendment views of William Rawle, who was a prominent lawyer and a member of the Pennsylvania Ratification Assembly.[117] In 1825, while writing concerning the meaning of the Second Amendment, Rawle stated: "No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people."[118] Third, the majority cited to Joseph Story's *Commentaries on the Constitution of the United*

111. *Id.* This brief foray by Justice Scalia into the natural or declaratory world appears to be an argument in the alternative from his long, drawn-out historical and textual arguments discussed above. If Justice Scalia's historical arguments are valid, he does not need this natural-right argument (it should be noted that Justice Scalia does not use the term "natural right," but he certainly implies that this "ancient" right existed before the ratification of the Second Amendment and that the Amendment merely codified this right). A natural-right argument does, however, have some teeth. If the Second Amendment only declared or formalized a natural, fundamental right, (the right to keep and bear arms), then the proper meaning or context of the Second Amendment would not make any difference because under a natural-right theory, the right to keep and bear arms exists independent of the Second Amendment—whether individual, collective or otherwise.

112. *Heller*, 128 S. Ct. at 2805.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (quoting 1 TUCKER'S BLACKSTONE, at App. 300).

117. *Id.* at 2805–06.

118. *Id.* (quoting RAWLE 121–22).

States, which was published in 1833.[119] Justice Scalia likely addressed Story's commentaries because Justice Stevens's dissent claimed that "[t]here is not so much as a whisper"[120] in Story's commentaries that favors an individual-right reading of the Second Amendment.[121] Justice Scalia stated that Justice Stevens "is wrong" about Story's commentaries.[122] Justice Scalia argued that Story cited to both Tucker and Rawle for his analysis of the Second Amendment—both of whom explicitly adopted an individual right to bear arms.[123] The majority also cited to an 1840 work by Story in which he wrote that one way in which tyrants "'accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms.'"[124] This post-ratification commentary strongly supports Justice Scalia's argument for an individual-right reading of the Second Amendment.

2. Justice Scalia addresses whether Supreme Court precedent allows an individual-right reading

Justice Scalia and the majority relatively briefly addressed whether an individual-right reading of the Second Amendment is at odds with past Supreme Court precedent.[125] Justice Scalia addressed the Supreme Court case most relied upon by the collective-right-reading advocates—*United States v. Miller*.[126] The majority was forced to address Supreme Court precedent because Justice Stevens in his dissent stated,

> Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself . . . would prevent most jurists from endorsing such a dramatic upheaval in the law.[127]

119. *Id.* at 2806.

120. *Id.* at 2840 (Stevens, J., dissenting).

121. *Id.* at 2806 (Scalia, J., majority).

122. *Id.*

123. *Id.*

124. *Id.* at 2807 (quoting JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 450 (reprinted in 1986) (1840)). This quote from Story's 1840 work may also be used to argue that he was not speaking of the people as individuals, but collectively in the context of the militia. The quote is too ambiguous to know if Story was discussing the individual rights of the people to keep arms for self-defense or if Story was discussing the right of the people generally to defend themselves from tyrants as a people—as through militias.

125. *Id.* at 2812.

126. 307 U.S. 174 (1939).

127. *Heller*, 128 S. Ct. at 2824 (Stevens, J., dissenting).

Justice Scalia asked, "And what is, according to Justice Stevens, the holding of *Miller* that demands such obeisance?"[128] Justice Scalia promptly rejected any argument that *Miller* adopted a collective, militia-related right to bear arms.[129] However, the evidence Justice Scalia used to support his argument that the *Miller* case does not adopt a collective-right theory is unclear and rather weak. Justice Scalia cited the following language from *Miller*,

> In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the *Second Amendment* guarantees the right to keep and bear *such an instrument*.[130]

Justice Scalia went on to say that this language from the *Miller* case "is not only consistent with, but positively suggests that, the Second Amendment confers an individual right to keep and bear arms."[131] It is unclear how Justice Scalia can make this claim. Also, Justice Scalia stated that if the Court had believed that the Second Amendment protected only those serving in the militia; it would have been odd to examine the character of the weapon rather than note that the two men were not militiamen.[132] However, in the language cited above, the *Miller* Court is using the prefatory clause as a limit on the operative "right to bear Arms" clause: an idea staunchly rejected by the majority earlier in Justice Scalia's opinion.[133] In the majority's rather strong endorsement for the individual-right reading of the Second Amendment, this discussion of the *Miller* holding may be the weakest part of the opinion.

Therefore, through historical, textual, natural law, and doctrinal arguments, Justice Scalia and the majority endorsed the individual-right reading of the Second Amendment for the first time in Supreme Court history.

128. *Id.* at 2814 (Scalia, J., majority).
129. *Id.*
130. *Id.* (quoting *Miller*, 307 U.S. at 178) (emphasis added).
131. *Id.*
132. *Id.* at 2814.
133. *See* discussion *supra* Part III.A.1.c.

B. Justice Stevens's Dissenting Opinion

Justice Stevens's dissent is very similar to the Ninth Circuit's arguments set forth in the *Silveira* case outlined above.[134] The Stevens dissent cited to historical, textual, and doctrinal arguments to support a collective-right reading of the Second Amendment.[135] Most notably, Justice Stevens argued that the militia-related prefatory clause limits the right-bearing operative clause and that the intent of the Framers was not to grant an individual right to bear arms, but to grant a collective, military-related right to bear arms.[136] Justice Stevens also cited to the Supreme Court precedent case of *United States v. Miller* to argue for a collective-right reading of the Second Amendment.[137] These main arguments in Justice Stevens's dissent have been extensively examined above in this Note's treatment of both the *Silveira* case and the majority's opinion above. Since these arguments have already been treated above, they will not be repeated here.

C. Justice Breyer's Dissenting Opinion

Justice Breyer joined with Justice Stevens's dissent in the *Heller* opinion but added his own, independent dissenting opinion to further counter the majority's historical and textual arguments. Justice Breyer also added some important discussion regarding deference to legislative findings relating to gun death and injury statistics.[138] Finally, Justice Breyer's dissent exposed the majority's failure to adopt a standard for courts to review existing and future gun-control regulations under this newly accepted individual-right reading of the Second Amendment.[139] Since the historical and textual arguments countering the individual-right reading were extensively treated above in the *Silveira* opinion,[140] and since the standard-of-review discussion will be treated extensively below, this section will examine Justice Breyer's argument for deference to gun-related death and injury statistics to support his arguments against the majority.

As has been outlined above, the two competing interests in the gun-control debate are (1) the government's interest in the public safety of its

134. *See* discussion *supra* Part II.A.
135. *Heller*, 128 S. Ct. at 2822–47 (Stevens, J., dissenting).
136. *Id.* at 2827–33.
137. *Id.* at 2845–46.
138. *Id.* at 2854–55 (Breyer, J., dissenting).
139. *Id.* at 2851–53.
140. *See* discussion *supra* Part II.A.

citizens, and (2) the protection of each citizen's enumerated rights.[141] In striking down the D.C. gun-control regulations, the majority generally chose to "protect" each citizen's enumerated right to keep and bear arms over the government's public safety interest. In his dissent, Justice Breyer used legislative findings and statistics to argue that the Court should have deferred to the D.C. legislature and aligned itself with the government's (in this case, the District of Columbia's) "compelling" interest in public safety.[142]

Justice Breyer first asked the reader to "consider the facts as the legislature saw them when it adopted the District [gun-control] statute" in 1976.[143] The goal of the statute, according to the local council committee, was "to reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia."[144] The committee conducted "extensive public hearings and lengthy research" to come to its conclusion that "the easy availability of firearms" has greatly contributed to the increase "in gun-related violence and crime over the past 40 years."[145] The Council consulted various mid-1970 gun-control statistics, for example, that guns were at least in part responsible for 69 deaths in the United States every day, 25,000 such deaths each year.[146] The Council also had information that in the 1970s, guns were responsible for 200,000 serious injuries in the United States.[147] In the District of Columbia itself, 285 murders were perpetrated by guns in 1974—"a record number."[148] The Council also had information that twenty-five percent of murders occurred among families and that "firearms are more frequently involved in deaths and violence among relatives and friends than in premeditated activities."[149] In passing the gun-control regulations at issue in *Heller*, the Council especially focused on the control of handguns because "the committee report found them to have a particularly strong link to undesirable activities in the District's exclusively urban environment."[150] Therefore, according to Justice Breyer, the District of Columbia City Council had ample justification in passing such a gun-control regulation in the 1970s.

141. *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting).

142. *Id.* at 2854–57, 2861.

143. *Id.* at 2854.

144. *Id.* (quoting *Hearing and Disposition before the House Committee on the District of Columbia on H. Con. Res. 694*, 94th Cong., 2d Sess., at 25 (1976)).

145. *Id.* (internal quotation marks omitted).

146. *See id.*

147. *See id.*

148. *Id.* at 2855.

149. *Id.*

150. *Id.*

Justice Breyer next suggested that the reader also "consider the facts as a court must consider them looking at the matter as of today."[151] In other words, does the statute still have statistical support today? According to Justice Breyer, the answer is a resounding "yes."[152] Justice Breyer cited various statistics that show only an increase in the severity of gun-related violence in both the United States and the District of Columbia since the statute was passed by the District of Columbia in 1976.[153] However, Justice Breyer also outlined statistics presented by those individuals seeking to overturn the D.C. regulations: statistics intended to demonstrate that the D.C. regulations have not made a difference in the violence.[154] Justice Breyer did not attempt to make sense out of the dueling statistics presented, but he convincingly concluded that the District had very important reasons for enacting the gun-control regulations and that the Court should defer to those strong justifications: "For these reasons, I conclude that the District's statute properly seeks to further the sort of life-preserving and public-safety interests that the Court has called 'compelling.'"[155]

IV. WHAT IS THE PROPER STANDARD OF REVIEW UNDER AN INDIVIDUAL-RIGHT READING?

The preceding twenty-plus pages of this Note have been largely dedicated to the dueling historical, textual, and doctrinal arguments put forth by both sides (both collectivists and individualists) of the Second Amendment debate. Now that the Supreme Court has apparently laid this debate to rest, how should courts scrutinize existing and future gun-control regulations for constitutionality under the newly adopted individual-right reading of the Second Amendment? Unfortunately, the majority in *Heller* refused to answer this question and failed to adopt a specific standard of constitutional scrutiny.[156] However, as stated by Justice Breyer in his dissent, "The question matters."[157] All the historical,

151. *Id.* (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)).

152. *Id.* at 2859.

153. *See id.* at 2856–57.

154. *See id.* at 2857–60.

155. *Id.* at 2861 (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)).

156. *See id.* at 2850–51. The majority rejected the rational-basis standard explicitly and the strict scrutiny standard implicitly (both of these standards and the majority's reaction to them will be explored below), but Justice Scalia and the majority were silent as to an appropriate standard of review. *See id.* at 2816–17 (Scalia, J., majority).

157. *Id.* at 2851 (Breyer, J., dissenting). The majority merely states that the District of Columbia's gun law is unconstitutional under "any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 2817–18 (Scalia, J., majority). The majority does respond to Justice Breyer's "interest-balancing" approach with criticism (which will be examined in greater

textual, and doctrinal support for the individual-right reading of the Second Amendment is for naught if courts are given very little direction on how to review gun-control regulations under this newly endorsed interpretation. Yet, as decided, *Heller* provided very little direction for future review of gun-control regulations. Justice Breyer's dissent rightly called the majority out on this issue.[158] Justice Breyer reviewed three potential standards that the majority could have adopted: (1) the rational-basis-scrutiny standard, (2) the strict-scrutiny standard, and (3) an "interest balancing" standard (this is the standard outlined and adopted by Justice Breyer).[159] Each of these standards was analyzed and critiqued below with Justice Breyer's interest-balancing standard of review being the standard the majority should have adopted in the *Heller* case. The only standard not rejected by the Court in *Heller*, the intermediate standard, is also briefly examined.

A. Evaluating Gun-Control Regulations under the Rational-Basis Standard

The rational-basis standard "requires a court to uphold regulation[s] so long as [they] bear a 'rational relationship' to a 'legitimate governmental purpose.'"[160] Under rational-basis scrutiny, "A statute is presumed constitutional."[161] That is, courts are extremely deferential to legislatures, requiring "the one attacking the legislative arrangement to negative every conceivable basis which might support it."[162] Under this deferential rational-basis standard, "[A] legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data."[163] When courts review laws under this very deferential standard, "almost all laws"[164] will be upheld.

The majority in *Heller* stated that the District of Columbia's gun regulations at issue in the case were unconstitutional under any of the standards of scrutiny previously used by the Court to examine

detail below), but the Court still refuses to adopt a standard of review, saying, "[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field." *Id.* at 2821. Adopting a standard of review to enable courts to correctly evaluate gun-control regulations would hardly require the Court to clarify "the entire field," yet the majority mysteriously refuses to venture down the road of constitutional standards of review.

158. *See id.* at 2851 (Breyer, J., dissenting).

159. *See id.* at 2850–53.

160. *Id.* at 2851 (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)).

161. *Doe*, 509 U.S. at 320.

162. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (internal quotation marks omitted).

163. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

164. *Heller*, 128 S. Ct. at 2817 n.27 (Scalia, J., majority).

enumerated constitutional rights.[165] However, as Justice Breyer pointed out in his dissent, the D.C. regulations would almost certainly survive rational-basis-scrutiny review.[166] In response to Justice Breyer's criticism, the majority stated that rational-basis scrutiny is predominantly used when the courts are evaluating laws that themselves prohibit "irrational" laws.[167] Therefore, according to the majority, rational-basis scrutiny should "not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right . . . [such as] the right to keep and bear arms."[168] Whether rational-basis scrutiny could apply or not, if this deferential standard were used to evaluate the D.C. gun-control laws at issue in this case, these regulations would likely be upheld because there would only need to be a showing of some rational basis for the laws. One clearly rational basis or legitimate governmental purpose for enacting the D.C. gun regulations was to prevent gun-related accidents. Additionally, under rational-basis scrutiny, the District would not even need to present empirical data as a foundation for this legitimate governmental purpose (which the legislature nevertheless did).[169] In anticipation of the *Heller* case, several scholars thought the Court could, and even should, adopt this rational-basis-scrutiny standard in evaluating gun-control regulations.[170]

Evaluating gun-control regulations under a rational-basis-scrutiny standard is likely too deferential to legislatures, especially given the Court's finding that the Second Amendment guarantees an individual right to keep and bear arms.[171] If essentially every gun-control regulation is upheld because the regulations are being evaluated under a rational-basis-scrutiny standard, the Supreme Court's individual-right holding would be gutted; no gun-control regulation would be found to violate the

165. *Id.* at 2817–18.

166. *Id.* at 2851 (Breyer, J., dissenting) ("The majority is wrong when it says that the District's law is unconstitutional '[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.' How could that be? It certainly would not be unconstitutional under, for example, a 'rational basis' standard . . . .").

167. *Id.* at 2817 n.27 (Scalia, J., majority).

168. *Id.* ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

169. *Id.*

170. *See* Saul Cornell, *Historical Approach: The Ironic Second Amendment*, 1 ALB. GOV'T L. REV. 292, 294 (2008) ("[T]he ultimate irony may well be that the Supreme Court [in *District of Columbia v. Heller*] could easily interpret the Second Amendment as an individual right and still uphold the District of Columbia's hand gun ban as a reasonable regulation."); Winkler, *supra* note 4, at 686.

171. *But see* Winkler, *supra* note 4, at 686. Professor Winkler argues that "the Second Amendment's individual right to bear arms is appropriately governed by deferential, reasonableness review under which nearly all gun control laws would survive judicial scrutiny." *Id.*

individual right of citizens to keep and bear arms because every legislature could demonstrate a rational basis for the regulation. Whether one agrees with the Court's individual-right reading or not, if lower courts are to follow the holding in *Heller*, this entirely deferential standard would not allow courts to apply an individual-right reading to any gun-control regulations and would essentially invalidate the *Heller* Court's holding. Therefore, the rational-basis-scrutiny standard should not, and likely will not, be used by lower courts to evaluate gun-control regulations under the newly adopted individual-right reading of the Second Amendment.[172]

B. Evaluating Gun-Control Regulations under a Strict-Scrutiny Standard

The strict-scrutiny standard is essentially the opposite of the rational-basis standard. That is, under the strict-scrutiny standard, instead of greatly deferring to legislatures, courts examine each law very closely "to determine whether it is 'narrowly tailored to achieve a compelling governmental interest.'"[173] Strict scrutiny is most commonly used when dealing with race-based legislation or classification.[174] The Supreme Court has held, "all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny."[175] Courts impose strict-scrutiny review in race-based situations because racial classifications "raise special fears that they are motivated by an invidious purpose."[176] Strict scrutiny is also employed by courts when statutes "interfere with the exercise of a fundamental right, such as freedom of speech"[177] or the free exercise of religion.[178] Strict scrutiny requires courts to perform a "searching judicial inquiry"[179] into the impetus behind, and reasons for, the enactment of the law in question.

Strict scrutiny is, along with rational-basis scrutiny, an inappropriate standard by which gun-control regulations should be evaluated.[180] Unlike the rational-basis standard where essentially all gun-control regulations

172. *See Heller*, 128 S. Ct. at 2817 n.27.

173. *Id.* at 2851 (Breyer, J., dissenting) (quoting Abrams v. Johnson, 521 U.S. 74, 82 (1997)).

174. *See* Johnson v. California, 543 U.S. 499, 505–06 (2005).

175. *Id.* at 505 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (alteration in original)).

176. *Id.* at 505.

177. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547 (1983).

178. *See* Thomas v. Review Bd. of Ind. Employment Div., 450 U.S. 707, 718 (1981).

179. Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989).

180. *See* Winkler, *supra* note 4, at 686. *But see* Roy Lucas, *From Patsone & Miller to* Silveira v. Lockyer*: To Keep and Bear Arms*, 26 T. JEFFERSON L. REV. 257, 329 (2004).

would be upheld, under a strict-scrutiny standard, essentially all gun-control regulations would be overturned or struck down. Under strict scrutiny, even gun-control laws explicitly accepted by the majority in *Heller*, such as laws governing concealed weapons, laws governing the sale of firearms, and laws restricting weapons in certain locations (like schools) could become constitutionally jeopardized.[181] Professor Adam Winkler states that gun laws should not be reviewed under a strict-scrutiny standard because "gun laws are generally motivated by legitimate public safety concerns rather than invidious purposes."[182] Justice Breyer, in his dissent, rejected the strict-scrutiny standard for reviewing gun-control regulations and claimed that the majority implicitly did the same.[183] Justice Breyer cites to a law review article that summarizes hundreds of gun-control decisions by the Supreme Courts of 42 states; these courts have expansively adopted a standard that is more deferential to legislatures than strict scrutiny.[184] Justice Breyer claimed the majority implicitly rejected the strict-scrutiny standard "by broadly approving a set of laws"; the section of the majority opinion Justice Breyer is referring to reads in part as follows:

> Like most rights, the right secured by the Second Amendment is not unlimited. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools or government buildings . . . .[185]

The majority labels these laws that limit the right to keep and bears arms as "presumptively lawful regulatory measures."[186] In other words, since these laws limiting the right to bear arms are "presumptively lawful," courts are not allowed to impose the higher strict-scrutiny standard to these regulations; under a strict-scrutiny standard, instead of courts presuming constitutionally, these laws would be considered presumptively unlawful. However, as described above,[187] the strict-scrutiny standard may apply to laws limiting the exercise of fundamental

181. *See Heller*, 128 S. Ct. at 2817; *see also id.* at 2851 (Breyer, J., dissenting).

182. Winkler, *supra* note 4, at 727.

183. *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting).

184. *See id.* at 2852 (citing Winkler, *supra* note 4, at 687, 716–18). Justice Breyer recognizes that these state cases "obviously are not controlling" but explains that these cases are instructive. *Id.* (citing Bartkus v. Illinois, 359 U.S. 121, 134 (1959)); *see also* David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 827, 827–29 (2002).

185. *Heller*, 128 S. Ct. at 2817.

186. *Id.* at 2817 n.26.

187. *See supra* text accompanying note 177.

rights. Is the newly declared individual right to keep and bear arms "fundamental"? Although the majority in *Heller* did not specifically label the individual right to keep and bear arms as fundamental, the majority likely considers the right as such.[188] It appears therefore paradoxical that the Court would imply that the individual right to keep and bear arms is fundamental and yet not grant this fundamental right strict-scrutiny protection as it has with free speech and the free exercise of religion.[189]

Why does the majority reject applying the strict-scrutiny standard to the Second Amendment and allow certain laws that limit the reach of the right to keep and bear arms to be considered "presumptively" constitutional or lawful? The answer is relatively clear: for the sake of public safety and general well being.[190] But how far does this public safety interest extend? After all, the District of Columbia enacted the gun-control legislation at issue in *Heller* for the sake of public safety.[191] The answer to the question of how far the public safety interest should extend may be found in Justice Breyer's interest-balancing approach to evaluating the constitutionality of gun-control regulations outlined below.

C. Evaluating Gun-Control Regulations under Justice Breyer's Interest-Balancing Approach

Instead of adopting the rational-basis or strict-scrutiny standards, Justice Breyer adopted "an interest-balancing inquiry" for the constitutional evaluation of gun-control regulations under the individual-right theory of the Second Amendment.[192] Justice Breyer's interest-balancing inquiry would weigh "the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other . . . ."[193] According to Justice Breyer, this interest-balancing approach strikes a balance between rational-basis review and strict-

188. In its historical support for an individual-right reading of the Second Amendment, Justice Scalia stated, "By the time of the founding, the right to have arms had become *fundamental* to English subjects." *Heller*, 128 S. Ct. at 2798 (emphasis added). The Court also points out that Blackstone "cited the arms provision of the Bill of Rights as one of the *fundamental* rights of Englishmen." *Id.* (citing 1 BLACKSTONE 136, 139–40 (1765) (emphasis added)).

189. However, Adam Winkler argues that "courts do not and have never applied strict scrutiny consisten.tly to all" fundamental or enumerated rights found in the Constitution. Winkler, *supra* note 4, at 694.

190. *Heller*, 128 S. Ct. at 2817.

191. *Id.* at 2854–55 (Breyer, J., dissenting).

192. *Id.* at 2852 (Justice Breyer did not agree with the majority's endorsement of the individual-right reading of the Second Amendment, but according to Justice Breyer, this interest-balancing approach should be applied to gun-control regulations under the majority's individual-right reading as well).

193. *Id.*

scrutiny review.[194] Justice Breyer justified this interest-balancing approach accordingly: "The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny)."[195]

Justice Breyer further explained that "where a law significantly implicates competing constitutionally protected interests in complex ways," courts should ask "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[196] In other words, courts must determine at what point a statute that is enacted to protect the public becomes unconstitutional because it impinges too significantly on a protected, enumerated right. This interest-balancing approach would allow judges to examine the statute's effects upon the competing interests and also allow judges to determine if "any clearly superior less restrictive alternative" exists.[197] When courts apply this interest-balancing standard, some degree of deference is given to a legislature's judgment in matters where a legislature has greater expertise and institutional fact-finding.[198] However, "a court, not a legislature, must make the ultimate constitutional conclusion, exercising its 'independent judicial judgment' in light of the whole record to determine whether a law exceeds constitutional boundaries."[199]

In criticizing this interest-balancing or "proportionality" approach, the majority of *Heller* states, "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[200] The majority saw Justice Breyer's "judge-empowering" standard as inappropriate because "The very enumeration of the right takes out of the hands of the government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[201] How can this be true? How would courts apply any standard to existing or future gun-control laws if they were not allowed to weigh the

194. *Id.*

195. *Id.*

196. *Id.* (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

197. *Id.*

198. *See id.* (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195–96 (1997)).

199. *Id.* (quoting Randall v. Sorrell, 548 U.S. 230, 249 (2006)).

200. *Heller*, 128 S. Ct. at 2821 (Scalia, J., majority).

201. *Id.* The majority also states, "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.*

government's interest in public safety against an individual's right to keep and bear arms? In accepting certain limitations on the right to bear arms,[202] isn't the Court weighing interests and determining that the right to bear arms "is [not] really worth insisting upon" in those limited circumstances? The majority did not give this interest-balancing standard as careful and honest an evaluation as it should have. Justice Breyer responded to the majority's criticisms of the interest-balancing standard in stating, "Contrary to the majority's unsupported suggestion that this sort of 'proportionality' approach is unprecedented, the Court has applied it in various constitutional contexts, including election law, speech cases, and due process cases."[203]

This interest-balancing standard is the correct standard for reviewing gun-control regulations and should have been adopted by Justice Scalia and the majority in *Heller*. As explained by Justice Breyer,[204] this approach strikes an important balance between the deference granting rational-basis standard and the far less deferential strict-scrutiny standard. In every challenge to gun-control regulations, two important interests will strongly compete against each other: the government's interest in protecting the public from the improper or accidental uses of guns versus the individual American's interest in preserving her right to keep and bear arms. Given these two competing and incredibly important interests, it would be improper for a court to begin its analysis with a presumption of either constitutionality or unconstitutionality.

Justice Breyer states that this interest-balancing approach is the "preferable" standard "for a further reason."[205] Justice Breyer further states, "Experience as much as logic has led the Court to decide that in one area of constitutional law or another, the interests are likely to prove stronger on one side of a typical constitutional case than on the other."[206] Since the Court has little experience in evaluating the Second Amendment under the individual-right interpretation of the Second Amendment, the interest-balancing standard would give courts the opportunity to weigh the interests without the built-in bias for or against the regulation that exists from the beginning of the evaluation in either the rational-basis or strict-scrutiny contexts.[207] Therefore, the Court in

202. *See supra* text accompanying note 185.

203. *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting) (citing Thompson v. W. State Med. Ctr., 535 U.S. 357, 388 (2002) (Breyer, J., dissenting)); Burdick v. Takushi, 504 U.S. 428, 433 (1992); Mathews v. Eldridge, 424 U.S. 319, 339–49 (1976); Pickering v. Bd. of Ed. of Twp. High Sch., 391 U.S. 563, 568 (1968)).

204. *See supra* text accompanying note 195.

205. *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting).

206. *Id.* at 2852–53.

207. *Id.* at 2853.

Heller should have adopted Justice Breyer's interest-balancing standard to give courts the direction and leeway to properly evaluate existing and future gun-control regulations.

*D. How Should Courts Evaluate Gun-Control Regulations post-*Heller*?*

In rejecting not only the interest-balancing approach of Justice Breyer, but also the rational-basis and (implicitly) the strict-scrutiny approaches, the majority in *Heller* has seemingly painted the Court into a standard-less corner. Justice Scalia and the majority merely stated that the District of Columbia gun-control regulations were unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[208] What standard should courts use to evaluate future constitutional questions regarding gun-control regulations? The answer is unfortunately far from clear. The Court in the *Heller* opinion has explicitly prohibited courts from using both the rational-basis standard and Justice Breyer's interest-balancing standard.[209] The Court, in regarding certain existing gun-control regulations as "presumptively lawful," implicitly prohibited courts from using the strict-scrutiny standard to review gun-control regulations.[210] Given the Court's reasoning, what standard is left?

The intermediate-scrutiny approach is the only standard not rejected by the Court, making this standard possible in an "addition by subtraction" process. To withstand intermediate scrutiny, a statute or classification must be "substantially related to an important government objective."[211] In comparison to this intermediate standard, rational-basis review requires a statute to bear a "rational relationship to a legitimate government interest,"[212] and strict scrutiny requires a statute to be "narrowly tailored to achieve a compelling government interest."[213] This intermediate standard would be very similar to Justice Breyer's "interest-balancing" approach because a court evaluating a statute under this intermediate approach would not begin with as strong a presumption for or against the statute as would exist with rational basis or strict scrutiny.[214] Since the Court rejected the interest-balancing standard

208. *Id.* at 2817 (Scalia, J., majority); *see also id.* at 2851 (Breyer, J., dissenting).

209. *Id.* at 2817, 2821 (Scalia, J., majority).

210. *See supra* text accompanying note 186.

211. Clark v. Jeter, 486 U.S. 456, 461 (1988) (stating that this intermediate approach "generally has been applied to discriminatory classifications based on sex or illegitimacy").

212. *See supra* text accompanying notes 160–64.

213. *See supra* text accompanying notes 173–79.

214. Adam Winkler states that an intermediate scrutiny standard "would likely lead to only marginally different results than either strict scrutiny or even the reasonable regulation [or rational-

suggested by Justice Breyer, the Court may also be unsatisfied with this similar, intermediate approach. Also, given that the District of Columbia could have very likely shown that the gun-control regulations at issue in *Heller* were substantially related to the "important governmental interest" of public safety,[215] it is difficult to see how the Court could have declared the D.C. gun-control regulations as unconstitutional under the intermediate-scrutiny standard. Therefore, given the strong similarity of the intermediate standard to Justice Breyer's interest-balancing standard, the Supreme Court would also likely reject this intermediate standard in reviewing gun-control regulations.

Given the explicit or implicit rejection of potentially every standard of constitutional review by Justice Scalia and the majority in *Heller*, courts are left guessing about how to review existing and future gun-control regulations under an individual-right reading of the Second Amendment. The Court made waves by expressly adopting the individual-right interpretation of the Second Amendment, seemingly ending a long and drawn-out constitutional debate. However, the Court likely created not only a new debate, but a cloud of mystery, in failing to adopt a standard for future review of gun-control regulations.

V. CONCLUSION

Competing interests are common to the law, and the competition between the government's interest in public safety versus its interest in the protection of enumerated rights is often seen in constitutional law. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms, putting to rest a long debate concerning the proper interpretation of the Second Amendment. However, in refusing to adopt a specific standard for courts to review existing and future gun-control regulations, and in possibly rejecting all standards commonly used to review statutes for constitutionality, the Court has likely planted the seeds for another long debate surrounding the Second Amendment. The Court should have adopted Justice Breyer's interest-balancing standard of review for future gun-control regulations. Unfortunately, the only thing made clear by the majority opinion in *Heller* regarding the future review of gun-control regulations is that the situation remains extremely unclear.

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basis] standard." Winkler, *supra* note 4, at 731.

215. *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting).

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